
**IN THE
SUPREME COURT OF MISSOURI**

No. SC84168

SOUTHWESTERN BELL YELLOW PAGES, INC.

Respondent,

v.

DIRECTOR OF REVENUE,

Appellant.

**Petition For Review
From The Administrative Hearing Commission,
The Honorable Karen Winn, Commissioner**

Appellant's Reply Brief

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Table of Authorities

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Argument

Any initial attractiveness of Bell's argument fades in light of the broad language of ' 144.610.1,¹ which imposes a use tax Afor the privilege of storing, using or consuming, within the state, *any* article of tangible personal property purchased[.]@ *Id* (emphasis added). The tax applies Awith respect to the storage, use or consumption of *any* article of tangible personal property purchased, produced or manufactured outside@ Missouri, once the article has finally come to rest within Missouri or become commingled with the general mass of property in Missouri. *Id*. The plain language of the statute indicates that Bell's purchase of the paper was subject to the use tax. *Lincoln Industrial, Inc. v. Director of Revenue*, 51 S.W.3d 462, 465 (Mo. banc 2001) (courts are instructed by legislature to take words in statute in plain and ordinary sense); ' 1.090, RSMo.

¹ All statutory references are to the Revised Statutes of Missouri (2000), unless otherwise noted.

Apart from limiting the types of ~~articles~~ to ~~tangible~~ personal property, the legislature placed no restriction on the nature of the articles that are subject to tax. Though Bell argues that cutting, printing and binding the paper out of state, before bringing it in state, allows it to avoid Missouri use tax on the paper, *see* Respondent's Brief, p. 7, the legislature did not limit the use tax to materials purchased out of state that are brought into the state in precisely the same form. Rather, the legislature drafted broadly, applying the use tax to ~~any~~ article of tangible personal property. ' 144.610.1.²

The legislature further signaled the breadth of the statute by imposing the tax on ~~any~~ article that is ~~is~~ purchased, produced or manufactured, once the article comes into Missouri. *Id.* Thus, the statute does not make a distinction between raw materials, completed materials, or anything in between, as Bell suggests it does. Respondent's Brief, p. 7. Rather, the statute, by its plain language, applies to any article purchased, produced, or manufactured outside of Missouri, that is subsequently brought in state for storage, use, or consumption, including the paper at issue here.

² As the Director noted in her initial brief, p. 16, ~~any~~ is defined in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) p. 97, as ~~any~~: one indifferently out of more than two . . . a: one or another . . . b: one no matter what one; EVERY . . . 3a: great, unmeasured, or unlimited in amount, quantity, number, time or extent[.]~~[emphasis added]~~

But if this Court believes that the language of the statute is ambiguous, then ~~A~~the ultimate guide [in construing such a statute] is the intent of the legislature.[@] *Lincoln*, at 465, *citing Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo. banc 1988). Bell did not address the legislature's purpose in enacting the use tax: to protect Missouri sellers against competition from out-of-state sellers, by removing any advantage that purchasers might gain by making purchases out-of-state ~~B~~ on which Missouri cannot collect sales tax. *R&M Enterprises, Inc. v. Director of Revenue*, 748 S.W.2d 171, 172 (Mo. banc 1988).

And Bell gained precisely that out-of-state purchase advantage when it purchased the paper at issue here ~~B~~ it paid no sales tax to any state at all. It is beyond dispute that had Bell purchased the paper in Missouri, the paper would be subject to sales tax. ' 144.020. Had Bell paid sales tax in a foreign jurisdiction, Missouri has a statutory offset provision to ensure that it does not pay twice. ' 32.200, Multistate Tax Compact, Art.V.1. Further, whether the ~~A~~Missouri Legislature could have taxed advertising sales,[@] Respondent's Brief, p. 8, that it has not chosen to do so is beside the point. The legislature has chosen to tax a broad category of transactions as provided by ' 144.610.1.

As Bell would have it, then, nothing about Bell's transaction is taxable ~~B~~ Bell does not sell or rent the directories, it gives them away in fulfillment of its contractual obligations to its advertisers. And charges for printing are not a taxable service. *See* ' 144.010.1(10) (specifying taxable services).³ The Director

³ The Director has already agreed to the other portion of Bell's refund request, refunding Missouri use tax for printing charges, plus statutory interest, in the amount of \$1,012,449.23. LF 14 (Joint Stipulation of Facts, & 13).

simply seeks to treat Bell in precisely the same way that she would treat any other entity making such a purchase in this state, but Bell's position, with which the AHC agreed, prevents her from doing so.

Bell also argues that the Director cannot distinguish *International Business Machines, Corp. v. David*, 408 S.W.2d 833 (Mo. 1966), the case on which both Bell and the AHC rely. Respondent's Brief, p. 7. Though the case is distinguishable, the Director's argument does not rise or fall on that factor. But the Director will briefly address Bell's arguments in this regard. Bell argues that the holding in the *IBM* case does not depend on the relative value of the materials that would be subject to use tax, compared to the value of the completed machines into which the materials go. Respondent's Brief, pp. 7, 9. Bell notes part of the Court's holding: that it need not decide whether differences between the materials that went into a machine and the value of the rental of the machine would justify separate classification[.]@*IBM*, at 835-836. But the Court went on to state, A[W]e do think these facts have some bearing on the determination of the applicability of our use tax.@ *Id.* In the *IBM* case, the materials were of little value in relation to the rentals of the completed machines that were ultimately taxed, *id.* at 835, and the Court ultimately held that the machine rentals were subject to tax, not the materials that went into the machines. Thus, to the extent that the percent value of the items at issue is greater than minimal, in comparison to the value of the completed items, the *IBM* decision supports the Director here B the paper comprised nearly half the value of the yellow page telephone directories,⁴ in contrast to the minimal value of the items at issue in *IBM*.

⁴

Compare the disputed request for a \$860,832.19 refund for the paper, LF 14 (& 14) to

Whether a raw materials of little value standard would be virtually impossible to administer, Respondent's Brief, p. 7, is probably an overstatement, particularly in view of the only two cases that have come before the Court on this issue: this case, where the value is half, and *IBM*, where the parties did not dispute that the value was minimal.

Bell also argues, essentially, that its paper changed in form *enough*, like the computer components in *IBM*, that it could not be identified as [a] separate article[], and therefore could not be subject to the use tax. Respondent's Brief, p. 7, *quoting IBM*, at p. 836. Unfortunately, the *IBM* decision does not identify the articles that went into the machines, whether wires, cords, screens, or computer housings. But as the Director pointed out in her opening brief, p. 15, the paper that Bell purchased here was as identifiable as paper at the time of purchase as it was when it came into Missouri and was delivered to the telephone subscribers it had to be. Bell's advertisers contracted with Bell to produce a paper directory, made with yellow pages. Bell could not have fulfilled its contractual obligations to its advertisers had it instead used white card stock or floppy disks, any more than it could have printed on the paper and then burned it to send smoke signals that conveyed the information.

Bell's arguments also ignore the significant fact that in the instant case, unlike in *IBM*, the property in question is neither resold nor rented. Because there is no ultimate sale of the directories, Bell is not entitled to avoid tax on its material purchases. In *IBM*, the Court noted that "materials" and "parts" were specifically exempted from both sales and use tax in this state. *Id.* at 836, *citing* ' 144.030.2 and .3,

the agreed request for a refund for printing charges of \$1,012,449.23, LF 14 (& 13).

RSMo (Supp. 1965). This exemption is found in the current version of the statutes. *See* ' 144.030.2(2).

The exemption applies, however, *only* where the materials become a "component part" of "new personal property," "which new personal property is intended to be sold ultimately for final use or consumption." *Id.*

In *IBM*, the computers were "resold" in this state through a rental. *Id.* at 837, *citing* ' 144.020.1(8), RSMo (Supp. 1965) (taxing rental of tangible personal property). In the instant case, however, Bell neither sells nor rents the directories. Instead, Bell uses the directories itself to fulfill obligations to its advertisers.

For this reason, in addition to the reasons stated above, the *IBM* case is inapposite here and should not determine the applicability of the use tax to Bell's paper purchases.

The Director also argues in her opening brief, pp. 15-17, that *IBM* goes a bit too far in holding that the use tax applies only to *completed* articles, as the insertion of the word *completed* is not supported by the plain language of the statute. Bell disagrees, pointing out that the Court *simply* [held] ... any article, whether raw or completed, and whether purchased, produced, or manufactured, is not subject to the use tax if it *was* never used in this state as such. *Respondent's* Brief, p. 8, *quoting IBM*, at 836. The Director will not restate that portion of her opening brief here, but points out, as discussed in her brief and above, that Bell certainly used the paper as paper (Bell used the paper *as such*).⁵

⁵ The AHC decision on which Bell relies, *Morton Buildings, Inc. v. Director of Revenue*, 1989 Mo.Tax LEXIS 138, No. 88-001879RZ (1989), *Respondent's* Brief, pp. 8-9, follows *IBM*. *Morton* involves raw materials such as lumber, steel sheeting, and nails, *4-*5, that the Commission held *as*[t] their individual identities and became a part of the manufactured product,⁶ and thus were not subject to use tax, *12-*13. But, unlike a board that is carved into a banister, metal sheeting from which

a hinge is stamped, or a nail driven into a panel, the yellow paper at issue here did not lose its identity as paper when it was cut, printed upon and bound, as discussed at page 7, *supra*.

Even apart from distinguishing *Morton* on the facts, *Morton* glosses over the plain language of the use tax statute, assuming that the statute applies to completed articles, rather than *any* article. It goes too far, as does *IBM*.

Further, *Use* is as broadly defined as *Any*,¹ discussed in footnote 1, *supra*. *Use* is *Use* 1a: the act or practice of using something: EMPLOYMENT ... 3a: the privilege or benefit of using something... b: the ability or power to use something...c: the legal enjoyment of property that consists in its employment, occupation, exercise or practice....² WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993), p. 2523. Bell's use of the paper, as paper, in its directories, that it distributed about Missouri in fulfillment of its contractual obligations, falls within the broad definition of *Use*,³ and thus, within the broad language of the statute.

Moreover, *Use* of the paper *B* or any other article *B* does not end inquiry into applicability of the use tax, because the statute applies not only to use, but to storage or consumption. ' 144.610.1. *See also State ex rel. Thompson-Stearns-Roger v. Schaffner*, 489 S.W.2d 207, 215 (Mo. 1973) (each word of statute is to be given meaning, legislature not presumed to have done meaningless act). Bell does not address whether it stored or consumed the paper. At a minimum, it appears that Bell consumed the paper in Missouri, upon distribution of the directories. *Consume* is *Consume* 1: to destroy or do away with completely ... 2 b: to use up: EXPEND....⁴ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993), p. 490. Bell only *Used up*⁵ or expended the paper once it distributed the paper directories, in fulfillment of its contractual obligations.

The broad language of the use tax statute encompasses Bell's purchase of the paper.

Conclusion

The decision of the Administrative Hearing Commission should be reversed, and the Director's denial of Bell's request for refund should be affirmed.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 31st day of May, 2002, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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